(c) interest at 8% per annum from the date of the writ;

(d) costs at High Court scale in the court below;

(e) costs of this appeal and cross-appeal; and

(f) the deposit should be given to the respondent on account of taxed costs.

Order accordingly.

Solicitors: *Skrine & Co.; Chang & Vello.*

T. BARIAM SINGH v. PEGAWAI PENTADBIR PESAKA MALAYSIA (ADMINISTRATOR OF ESTATE OF DATUK FOO SAY LEE)

[O.C.J. (Mohamed Zahir J.) January 28 & May 12, 1980]
[Kota Bharu – Civil Suit No. 2 of 1970]

Contract – Security for loan – Malay Reservation land title as security for loan – Whether contract null and void – Kelantan Malay Reservations Enactment 1930, ss. 7, 9, 9A(1), 12(i) & 13A – Kelantan Land Enactment 1938 (repealed), ss. 2, 104, 105(i), 106 & 128 – National Land Code, ss. 2, 4, 270 & 281.

Land Law – Malay Reservation land title – Security for loan – Whether contract of loan null and void.

The plaintiff in this case sued the defendant for the repayment of $10,000/- being a loan on a promissory note. The issue before the court was whether the defendant, Datuk Foo, in depositing a Malay Reservation land title with the plaintiff as security for a loan, rendered the contract of loan null and void.

Held: (1) what the law aims at is that the land should not fall into the hands of a non-Malay as clearly can be argued from section 7(i) of the Kelantan Land Malay Reservations Enactment. It does not confine itself to the interest of the existing Malay proprietor. "Any Malay" intended here is the general Malay and not any Malay in particular. If it is otherwise, then even a Malay chargee cannot levy execution on the land by sale as interest of the Malay proprietor is affected;

(2) if acts are done in accordance with the Malay Reservations Enactment, then such acts are lawful;

(3) in the instant case, there was nothing illegal in the mere deposit of title by the defendant. The deposit of title was made during the life of the Land Enactment which was then in force. There is no provision in either the Malay Reservations Enactment or the Land Enactment which prohibits such deposit of title and such deposit of title was therefore not illegal;

(4) the plaintiff was therefore entitled to enter judgement against defendant for the sum of $10,000/- and interest.

Cases referred to:–

(1) *Ho Giok Chay* v. *Nik Aishah* [1961] M.L.J. 49.
(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.
(3) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158.
(4) *Idris bin Haji Mohamed Amin* v. *Ng Ah Siew* [1935] M.L.J. 257.
(5) *Tan Hong Chit* v. *Lim Kin Wan* [1964] M.L.J. 113.
(6) *David* v. *De Silva* [1934] A.C. 106.

CIVIL SUIT.

C. Jegathesan for the plaintiff.
Lim Hong Sang for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sued the defendant for the repayment of $10,000/- being a loan on a promissory note. The Defence Counsel abandoned all his other defences and asked the court to consider only the issue of illegality under the Kelantan Malay Reservations Enactment 1930. The Plaintiff's Counsel agreed and I accordingly ordered the parties to submit on this point alone. The issue is whether the defendant, Datuk Foo Say Lee, in depositing a Malay Reservation land title with the plaintiff as security for a loan, rendered the contract of loan null and void.

Mr. Lim, Counsel for the Defence, submitted that by virtue of section 12(i) of the Enactment, the contract between the parties is void. The reason is that the promissory note, AB3, contained as security for the loan the deposit of title bearing Grant No. 2481/9 Lot No. 80, section 14 of Kota Bharu, a Malay Reservation land belonging to the borrower with the plaintiff who is a licensed moneylender and the accompanying memorandum of agreement for repayment (AB1) also referred to such security.

Section 12(i) of the Enactment reads as follows:–

"All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void."

and Counsel referred to section 9 which reads as follows:–

"No right or interest of any Malay in Reservation land shall be sold in execution of a decree or by order of any court or for non-payment of rent due to the Government to any person not being a Malay."

and also Section 9A(1) which reads as follows:–

"Notwithstanding anything hereinbefore contained the proprietor of any reservation land may charge such land or any part thereof to any person specified in Schedule D, and may in favour of any such person create, subject to the provisions of section 128 of the Land Enactment a lien by deposit of the issue document of title for such land."

The Schedule as referred to in 9A(1) does not include the plaintiff.

Counsel further submitted that the plaintiff is not entitled to restoration under section 66 of the Contracts Act as he had not pleaded that he did not know of the illegality in his Statement of Claim or in his Defence to the Counter-claim. As he now agrees to proceed with the case on his pleadings and that the Defendant has agreed to the quantum subject to argument on illegality, then the plaintiff could not be entitled to restoration of the money. I agreed with the Defendant's Counsel on this point and the only issue to decide now is whether the loan transaction offended the Malay Reservations Enactment or not.

Mr. Jegathesan, Counsel for the Plaintiff, argued that section 12 of the Enactment should be read together with section 13A which confines to dealings in land which could not be dealt with unless with the approval of the Ruler-in-Council and these dealings are confined to only alienation, transfer or transmission. He contended that mere deposit of title is not caught under section 12 of the Enactment. He submitted this is not a lien under section 128 of the Kelantan Land Enactment 1938. (The loan was made on January 9, 1964 and the National Land Code came into force on January 1, 1966).

Section 128 of the Land Enactment provided procedures how to create a lien and as these procedures were not complied with by the parties and accordingly, according to Counsel for the plaintiff, the deposit of title was not a lien as envisaged by the Malay Reservations Enactment. The other point submitted by Counsel is that the title deposited was a "Surat Ganti Geran" and not under part B of the Land Enactment and therefore not covered by section 9A(1) of the Malay Reservations Enactment. I do not think there is any weight from this last argument because section 9A(1) refers to any reservation land and not to type of document of titles and the land involved here is a Malay Reservation land.

Both Counsel submitted to me arguments on "dealings" as provided under section 12(i) of the Malay Reservations Enactment. There being no definition of this word in the Malay Reservations Enactment, they referred to section 128 of the repealed Kelantan Land Enactment, to section 2 of the National Land Code and to section 281 of the Code as to creation of liens.

My own opinion is that in interpreting whether a charge or lien is valid or not we should not go out from the four corners of the Malay Reservations Enactment. From the clear wordings of section 12(i) it is expressly provided that all dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void. The "dealings" or "disposals" under this section are confined to only dealings or disposals contrary to section 7 and which does not include the word "charges". Section 10 refers to only charges created prior to the introduction of the Enactment itself. Fourteen years later when the amendment to section 9 was made by introducing section 9A, the amendment still does not in any way remove any doubt as to whether charge to non-Malays is invalid. In fact to some, the introduction of the amendment 9A strengthens the argument that the State legislature had intended that the word "dealings" in section 12(i) includes charges in section 7. But whatever it may be, section 7 is conspicuously silent as to charges and liens. The solution before us is the interpretation as to whether this section includes charges and liens.

What are the dealings which are prohibited by the Malay Reservations Enactment? This is contained in section 7 which applies to:

(a) Transfers or transmissions of interest;

(b) Leases for a period more than a month, other than leases from month to month;

(c) Right given to a lessee to renew the lease.

Section 7(iii) allows a lease to be for a period not exceeding three years after approval by the Ruler-in-Council. Section 7(vi) also provides the right of transmission to the deceased's natural heirs and transfers by guardian, trustee or administrator to persons legally entitled to such lands.

Section 8 prohibits the right of any holder of a power of attorney to deal in Malay Reservation land. Except for section 7 there is no other provision in the Enactment which stipulates the type of dealings which are prohibited.

As I see it, the Enactment does not prohibit a charge or lien. I do not think that the law intends to include "charges" under dealings. If it was so intended then the legislature would have simply included the word "charged" in section 7(i). It is inconceivable to allege that the legislature had overlooked to add the word "charge" in this section, as the word appears elsewhere in the Enactment particularly in sections 9 and 10 which contained the contrary inference that a charge is not restricted to be created to non-Malays. The only qualification is that the purchaser must be a Malay. Even with the introduction of section 9A as amendment to section 9, it does not affect the position and should not have given rise to the interpretation that the law had intended to include charge as being also prohibited. I am, however, of the opinion that section 9A was introduced with a purpose of enabling charges or liens to non-Malays such as banks, co-operative societies and other corporate bodies and to those persons authorised by the Ruler-in-Council under Schedule D of the Enactment to be enforceable and registrable by removing them from the operation of section 104 of the Kelantan Land Enactment which prohibits such registration unless the chargee is a native of Kelantan. Sections 104, 105, 106, 107 and 108 are saved by Twelfth Schedule of the National Land Code and therefore are still in force in Kelantan.

Section 104 of the Kelantan Land Enactment reads as follows:—

"(i) The Land Registrar shall refuse to register any transfer, charge or lease of land by a native of Kelantan to a party who is not a native of Kelantan, until such transaction has received the sanction of His Highness the Sultan in Council subject to the imposition of such restrictions in interest and such conditions in the document of title and such terms of rent therein as he may think fit and any such transfer, charge or lease shall be null and void unless the previous sanction of His Highness the Sultan in Council shall have been obtained ..."

The same F.M. Ordinance 25/54 amended both section 9 of the Malay Reservations Enactment and section 104 of the Land Enactment. The amendment provides that section 104(i) is not applicable to a charge to a person specified in Schedule 26A and section 9 of the Malay Reservations Enactment is amended by allowing charges to a person under Schedule D. Both Schedules 26A and D should therefore contain the same list of persons. The effect is, it would enable the Land Officer to register the charge notwithstanding that the chargee is a non-native of Kelantan.

The objects and reasons of the amending law, F.M. Ordinance 25/54 to section 9 of the Reservations Enactment and section 104 of the Land Enactment read as follows:—

"The legislation in force in the former Federated Malay States, Johore and Trengganu relating to Malay Reservations imposes certain restrictions upon the charging of land in such Reservations ... A similar, though somewhat broader, restriction is contained in the Land Enactment of Kelantan."

It is to be noted therefore that the bill refers to laws in force in the former Federated Malay States, Johore and Trengganu where "charges" then were expressly probihited in their respective laws. It does not refer to Kelantan and the restriction in Kelantan in the creation of charges lies in section 104 of the Land Enactment and not the Malay Reservations Enactment. It is therefore abundantly clear that the amendment 9A is intended as far as Kelantan is concerned to remove the restriction under section 104 of the Land Enactment which is entailed in the amendments to both section 9 of the Malay Reservations Enactment and section 104 of the Land Enactment. The amendments are not therefore intended to reiterate the position that the legislature had earlier intended that charges are not permitted under the Malay Reservations Enactment.

It may be argued that there was no necessity for amending section 9 of the Malay Reservations Enactment after removing the operation of section 104 of the Land Enactment. But I am of the opinion that such amendment was necessary in order to remove the restrictions of the other provisions of the Land Enactment from operation which may affect charges envisaged under section 9A. Provisions such as section 85 which provides that no instrument until registered in the manner provided in the Land Enactment should be effectual to pass any land or any interest therein or render any land liable as security for payment of money. Section 106 prohibits a non-native chargee from enforcing the agreement of loan. So by amending section 104 of the Land Enactment alone would not be sufficient to remove the restrictions under these provisions of the Land Enactment which were then still in force. So the solution was to simply amend the Malay Reservations Enactment and by virtue of section 1(iii) of the Land Enactment it provides that nothing contained in the Land Enactment should prevail against the Malay Reservations Enactment.

However, in *Ho Giok Chay* v. *Nik Aishah*[1] Hepworth J. ruled that a charge of a Malay reservation land in Kelantan is an interest in land and therefore constitutes a breach of section 7(i) of the Reservations Enactment. With respect, I do no agree with such an interpretation. A charge cannot be an interest in land as the chargee is not given any interest in the land as to the emjoyment and use of it. A "charge" as defined by the *Dictionary of English Law* by Earl Jowitt, 2nd Edition, as applied to property signifies that it is security for the payment of a debt or performance of an obligation. It can be admitted that a charge is a right over land as stated by Mr. Lim Kean Siew in his article in [1965] 2 MLJ page xvi but it cannot be an interest in the land. Mr. Lim Kean Siew in this article disagrees with the decision of Hepworth J. in *Ho Giok Chay's* case.

The objects and reasons for the Malay Reservations Enactment clearly indicate that charges are permitted. They state as follows:–

"The present Enactment provides for the creation of Malay Reservations in which areas no land may hereafter be alienated to any other person than a Malay (as defined by the Enactment) and no title held by a Malay may be transferred, leased or otherwise disposed of to any person other than a Malay. Charges to non-Malays, however, are permitted, with a proviso that if the land charged is sold in satisfaction of the charge no person other than a Malay may bid at the auction, the object of the Enactment being not so much to preserve to individual Malays the lands that they own but to ensure that Reservation lands shall continue to be owned by Malays in general."

It would appear that before *Ho Giok Chay's* case, charges to natives of Kelantan non-Malays were being registered in the Land Offices in Kelantan. Even the charge in *Ho Giok Chay's* case itself was so registered and the dispute arose when the Applicant/Chargee took out Originating Summons to enforce the charge. Further indication that it was never the intention of the legislature to exclude non-Malay native from being a chargee is in section 105(i) of the Land Enactment. It provides that '... no person who is not a native of Kelantan shall be allowed to bid ... may be allowed to bid ...' The word "native of Kelantan" includes non-Malays as defined under section 2 of the Land Enactment. Further, under section 8 land could only be alienated to a native of Kelantan and under section 104, a charge to a native of Kelantan is registrable.

Among the reasons stated by Hepworth J. in his judgment for coming to the conclusion that a charge is an interest in land are as follows:–

(a) That the chargee is given the right at all reasonable times to enter upon such land and to view and inspect the state of repair of such buildings and improvements; and

(b) In case of default of payment by the chargor, the chargee is at liberty to issue a summons to call the proprietor of the charged land before the court to show cause why the land should not be sold by public auction and subsequently compel the land to be sold.

I am, however, of the opinion these rights of the chargee do not in any manner confer any right or interest in the land charged in the chargee. The right of a chargee to enter upon the land and to inspect the state of repair is normally included in a memorandum of charge or even provided for by the Land Code as an implied condition which is for the purpose of enabling the chargee to see that his security is not diminished in value. It is one of the conditions stipulated in the charge, the chargor must keep the property charged in good condition and repair. If on the land charged stands a brick house with marble floors, then it would be a breach of the conditions for the chargor to cart the pieces of marble floors away thereby diminishing the value of the property charged which is in fact the security for the money lent by the chargee.

As to reason (b), I think this action by the chargee is permitted and envisaged by section 9 of the Malay Reservations Enactment. The chargee cannot have the land sold to any person except to a Malay and for Kelantan it should be a Kelantan native Malay. If we are to accept the fact that the effect of a chargee in taking steps to have the land sold is itself conferring interest in the land in the chargee and therefore illegal then any application by a non-Malay to have a reservation land sold is prohibited. Take for instance, a native is ordered to pay by a court to a non-Malay $5,000/- on goods sold and delivered and the creditor subsequently after a search discovered that the debtor is a proprietor of a reservation land. Can this non-Malay creditor now apply for execution and sale of the land? If we accept Hepworth J.'s argument to be correct, then the answer would be in the negative because the very moment the creditor starts the motion to have the land sold by public auction he had acquired interest in the land. What is the existing practice? I ascertained that such creditors have been applying for and obtaining execution by public sale of the land to native Malays. I do not consider that there is anything

illegal in this as it is in compliance with section 9 of the Malay Reservations Enactment.

What the law aims at is that the land should not fall into the hands of a non-Malay as clearly can be argued from section 7(i) which states:—

"No right or interest of any Malay in Reservation land and no right or interest in such land acquired by virtue of section 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-sections (ii) to (v) below, save as provided in this Enactment."

It does not confine itself to the interest of the existing Malay proprietor. "Any Malay" intended here is the general Malay and not any Malay in particular. If it is otherwise, then even a Malay chargee cannot levy execution on the land by sale as interest of the Malay proprietor is affected.

In other words, in my opinion, if acts are done in accordance with the Malay Reservations Enactment, that is in the words of section 12(i) not "contrary to the provisions of this Enactment" then such acts are lawful.

Thus, in *Foo Say Lee* v. *Ooi Heng Wai*[2], an agreement to the transfer of a reservation land to a non-Malay subject to the approval of Kelantan government and the Ruler-in-Council was held to be valid. It was held further in that case that only attempts to deal in reservation land contrary to the provisions of the Enactment would be null and void. Section 13(A) of the Malay Reservations Enactment allows transfer or transmission of a reservation land to a non-Malay on approval by the Ruler-in-Council.

It can be argued with equal force such agreement of sale as in this case affects interest in the land. The owner is prohibited from dealing in the land until the final decision of the Ruler-in-Council. But it was held that such transaction was valid, even if it might affect the interest in the land as it is permitted by the law that is by virtue of section 13(A). Similarly, it can also be argued even if it is to be admitted that charges deal in interest in land, such transaction does not contravene the Malay Reservations Enactment as it is envisaged under section 9 of the said Enactment. However, if a purchaser or a chargee enters possession of the reservation land then it would be contrary to the Enactment; the parties are then attempting to transfer the interest in the land to a non-Malay.

This could be seen in *Gan Khor* v. *Soan bin Pelita*[3] where the charge was registered under the F.M.S. Malay Reservations Enactment, 1913 but the chargee went into occupation and it was held that the plaintiff was not entitled to occupation. This case was followed in *Idris bin Haji Mohamed Amin* v. *Ng Ah Siew*[4] where a similar occurrence followed where the chargee after a charge went into occupation by virtue of a Power of Attorney. It was held that a Power of Attorney related to a right or interest in Reservation land and therefore revocable and it was further held that the whole transaction was null and void under section 13 of the F.M.S. Malay Reservations Enactment 1913. The charge in that case was also registered.

It is to be noted that section 13 of the repealed F.M.S. Malay Reservations Enactment 1913 is *in pari materia* with Kelantan section 12(i). It reads as follows:—

"All dealings or disposals whatsoever and all attempts to deal or dispose in or of Reservation lands contrary to the provisions of this Enactment shall be null and void."

Terrell, J. in his judgment in *Idris's case* stated as to charges:—

"Although the charges had to be considered in coming to a conclusion as to the meaning and effect of the agreement and power of attorney, there is nothing contrary to the Enactment in the charges themselves ..."

Thus, it could be seen that in the former Federated Malay States, reservation lands could be charged to non-Malays and it would appear that F.M.S. Enactment 1913 was the basis of the Kelantan Malay Reservations Enactment 1930 except for certain variations.

Further indication that the law does not prohibit "charges" to non-Malays is from the wordings of section 13A of the Malay Reservations Enactment which permits the Ruler-in-Council to:

(a) alienate any State land held under a Reservation land; and

(b) transfer or transmit the right or interest of any Malay in reservation land

to a person not being a Malay. This section clearly leaves out the word "charge" and the logical conclusion is that because there is no necessity for the approval of the Ruler-in-Council for a charge as it is permitted by the law.

The National Land Code which came into force on January 1, 1966 repealing all the State Land Codes with the exception of several savings, allows the chargee to go into possession of a charged land where the chargor has defaulted payments subject on condition that the land is held under the registry title and that the land is not occupied by the chargor (see section 270 of the National Land Code). It does not give right of possession in cases of titles held under Land Office title. But I think in view of section 4 of the National Land Code which stipulates that nothing in the Code would affect the provisions of any law for the time being in force relating to Malay reservations or Malay holdings, charges still continue to be valid. Thus, if charges of reserved land prior to the inception of the National Land Code were valid, then nothing in the Code can affect the Malay Reservations Enactment so as to turn such charges, at least in so far as it affects Registry land, to be invalid. In such circumstances, the Malay Reservations Enactment prevails and a chargee is charged Registry title cannot enter into possession in the event of the chargor's default, and if he does so then and only then the charge will be held to be null and void for having contravened the provisions of the Malay Reservations Enactment.

It we examine the laws of all States in the former Federation of Malaya relating to Malay reservation or Malay holding lands, all such States if they wish to prohibit charges to non-Malays will clearly and expressly make such provisions in their respective laws. The F.M.S. Malay Reservations Enactment 1933 Chapter 142, section 8(i) provides as follows:–

"Subject to the provisions of subsection (ii) and of sections 16 and 17 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles."

As I stated earlier, the F.M.S. 1933 Enactment amends the 1913 Enactment which before permitted charges to non-Malays.

Section 9(i) of the Trengganu Malay Reservations Enactment 1360H.:

"Subject to the provisions of subsections (ii) and (iii) of this section and of sections 11 and 19, no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section or any other sections in this Enactment shall be capable of registration in any Land Office or Registry of Titles."

Section 9(i) of the Johore Enactment 1936:

"Subject to the provisions of subsections (ii) and (iii) and of sections 17 and 18 no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office."

Section 5(i) of Perlis Enactment:

"Save as hereinafter provided in this Enactment, where any Reservation Land is held under a document of title by a Malay, no right or interest therein shall vest whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay; and where any Reservation Land is held under a document of title by a Siamese, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in a person who is not either a Malay or a Siamese."

It would appear that originally the wordings of Perlis Enactment 1353H. were *in pari materia* with those in Kedah Enactment (Revised 1934). However, there appear to be an amendment to section 5 of the Perlis Enactment by enacting section 5A which now expressly prohibits charges and this section 5A reads as follows:–

"(i) Save as hereinafter provided in this Enactment no reservation land held under a document of title by any Malay shall be mortgaged, charged or leased to any person who is not a Malay and no Reservation Land held under a document of title by any Siamese shall be mortgaged, charged or leased to any person who is not either a Malay or a Siamese."

Section 6(1) of the Kedah Enactment (Revised 1934):

"Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese."

In Kedah it has been the practice that reservation lands are chargeable to non-Malays and no Court has ever held it to be null and void and no one has ever, in my own recollection, challenged this in court. However, as provided by the Enactment all purchasers of sale of reservation lands are limited to Malays only. It is interesting to note

that if we accept Hepworth J.'s decision is correct that a charge is an interest in land and therefore void then applying the principle of this decision it should also be applicable to charges in Kedah as the Kedah Enactment also contained the wordings: "no right or interest therein shall vest". Properly speaking therefore no charges to non-Malays should be registered in Kedah.

There is yet another aspect in the interpretation of the Kelantan law. As there is no express prohibition in the Kelantan Malay Reservations Enactment prohibiting charges, the interpretation should be in favour of the freedom of the individual to create such charges. In this respect, I would refer to Suffian J.'s decision (as he then was) in *Tan Hong Chit v. Lim Kin Wan*[5] at page 115 where he stated the language in section 13A (iii) was only permissive, permitting a certain kind of disposal and could not be construed as prohibiting by necessary implication disposal of any other kind. He then went on to quote *David* v. *De Silva*[6] 106 that where there is ambiguity as to the meaning of a disabling statute the construction which is in favour of the freedom of the individual should be given effect to.

It is not to be suggested as an argument that since prior to *Ho Giok Chay's* case it was the practice to have charges registered in favour of non-Malay native, therefore it would follow that this practice was right. It is not necessarily so. What I am saying is that since this was before a practice adopted by the Land Officers who were under the instructions of the Ruler-in-Council, therefore, it was not expected that the Ruler-in-Council would have given such instructions to effect the registration if it was never the intention to do so. It follows therefore we cannot maintain as correct the argument as found in *Ho Giok Chay's* case that it was the intention of the legislature to prohibit charges to non-Malays. In fact it had become some sort of a policy for the State to allow such charges before. David Wong in his *Tenure and Land Dealings in the Malay States,* 1st Edition at page 525 states as follows:—

"It may be stated to be whether, in view of the common practice, even if the general prohibitive provision is literally wide enough to cover charges, it ought to be regarded as being qualified by an implication that the Enactment, by providing for special safeguards againt charged land being sold to a non-Malay, nonetheless allows land to be charged in favour of non-Malays."

Therefore, I am of the opinion that there is nothing unlawful for a Malay reservation land to be charged to a non-Malay under the Kelantan Malay Reservations Enactment. But in Kelantan there is another prohibition imposed by section 104 of the Land Enactment which stipulates that the Registrar shall refuse to register any transfer, charge or lease of land to a non-native. Natives of Kelantan are defined under section 2 of the Land Enactment which are briefly second generation non-Malays born in Kelantan, first generation Malays born in Kelantan and Malays residing in the State for more than 15 years.

Thus I am of the opinion that there is nothing contrary to the Malay Reservations Enactment for a charge, lien or deposit of title to be created in favour of a non-Malay. Section 104 of the Land Enactment merely stipulates any transfer, charge or lease in favour of a non-native to be unregistrable. It does not say these dealings are illegal. Section 106 of the Land Enactment also does not have such declaration of illegality but somewhat permits such dealings subject to the approval of the Sultan in Council. The declaration of illegality is to be found only in section 12(i) of the Malay Reservations Enactment which, in my view, does not include charges, liens or deposit of title.

It follows therefore in the instant case, there is nothing illegal in the mere deposit of title by the defendant. The deposit of title in this case was made during the life of the Land Enactment which was then in force. Section 128 provided that to create a lien the proprietor must deposit with the lender the title and the lender must lodge a caveat in the form of Schedule 35 and only then a lien is created and not otherwise. But it appears that there is no provision in either the Malay Reservations Enactment or the Land Enactment which prohibits such deposit of title and such deposit is therefore not illegal. Further, in the instant case, the plaintiff is not suing on or seeking to enforce the lien. He is suing only on the loan. In the circumstances, he is entitled to the judgment he prays for.

I enter judgment for the plaintiff as follows:

(a) the capital sum of $10,000/-;

(b) the interest thereon accrued as at 9.12.69 — $6,100/-;

(c) further interest thereon at 12% per annum from 9.12.69 to the date of the commencement of this suit;

(d) interest on the Judgment amount calculated at 6% per annum from the date of judgment to date of realisation of Judgment;

(e) costs of this suit.

Claim allowed.

Solicitors: *Jegathesan & Co.; H.S.Lim & Co.*

LIM WIE TEE v. KOH HENG JIN & ORS.

[O.C.J. (B.T.H. Lee J.) July 17, 1980]

[Kuala Lumpur – Originating Motion No. F 28 of 1979]

Land Law – Private caveat – Allegation of contract of sale – Affidavits inconsistent with allegation – Whether her caveat should be discharged.

The applicant had lodged a private caveat against the land, the subject of an alleged contract of sale, on the ground that there was a contract of sale between him and the respondents. On an application by the respondents to have the caveat removed

Held: the affidavits of the applicant showed that the applicant had put himself into a situation quite inconsistent with his assertion on the one hand that there was a contract and on the other which was directly in conflict with his assertion, he having made allegations of fraud, mistake, misrepresentation and illegality. The caveat must therefore be removed.

Editorial Note: Upon appeal to the Federal Court (Federal Court Civil Appeal No. 182 of 1980) no order was made but an early trial of the Originating Motion was ordered.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212 P.C.
(2) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.
(3) *Tham Kong* v. *Oh Hiam & Ors.* [1968] 1 M.L.J. 44; see [1980] 2 M.L.J. 159.
(4) *Hillas & Co. Ltd.* v. *Arcos Ltd.* [1932] All E.R. Rep. 494.
(5) *Nicolene Ltd.* v. *Simmonds* [1953] 1 All E.R. 822
(6) *Perry* v. *Suffields Ltd.* [1916] 2 Ch. 187.
(7) *Winn* v. *Bull* (1877) 7 Ch. Div. 29.
(8) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1911-13] All E.R. Rep. 148.

CIVIL SUIT.

Ong See Seng for the applicant.

Lim Kean Chye for the respondents.

Cur. Adv. Vult.

B.T.H. Lee J.: This is an application by way of Notice of Motion for an order that the Order of the High Court dated 5.11.1979 obtained by the Applicant be set aside and that the private caveat registered as No. 659/78 Vol. I Folio 135 on land held under Geran No. 19446 Lot No. 6659 Mukim Kajang be removed forthwith.

The right of a person to lodge a caveat under the National Land Code (hereinafter referred to as "the Land Code") has been discussed in the case of *Eng Mee Yong & Ors.* v. *V. Letchumanan*(1) in which the Privy Council held:

> "The onus was on the caveator to satisfy the court that on the evidence presented to it his claim to an interest in the property did raise a serious question to be tried."

The letter of offer from the co-owners, omitting the irrelevant parts, is as follows:–

> "We offer to sell you and or your nominee/s the above property free from all encumbrances and with vacant possession at the purchase price of Ringgit Twenty Thousand ($20,000/–) only per acre computed to value at Ringgit Five Million, Eight Hundred and Ninety Thousand ($5,890,000/–) only and upon the following terms:–
>
> 1. This offer is given for valuable consideration and is valid and irrevocable up to October 15, 1978.
>
> 2. The purchase price is to be paid in cash upon execution of transfer of the said property.
>
> 3. Sellers Commission of one percent (1%) of the purchase price to be payable to brokers through you.
>
> 4. All taxes, including Real Property Gains Tax, if applicable, shall be retained by Solicitors.
>
> 5. Other usual terms of such sales to be incorporated in a Sales Agreement upon acceptance of this offer and upon your payment of a sum of Ringgit Twenty Thousand ($20,000/–) only in cash, refundable forthwith in the event that our offer to sell you the above property is unacceptable by you and or your nominee/s."

It is reasonably plain that the letter of offer is not the contract. It was originally an offer by various co-owners to a family company, Koh Hooi Cheow Realty Sendirian Berhad. As the Respondents' affidavits in support show, the contract which was made between the Applicant and the Respondents, is made up of the said letter of offer, the conversations between the parties and their lawyers, and the correspondence. It is this whole evidence that must be looked at to see what the contract is between the parties.

I may usefully quote the following passage from *Chitty on Contract*, 24 Ed., Vol. I, at page 48 under the heading "Incomplete Agreement":